

SOUTH AFRICA / JUDGMENT

Ligthelm v Road Accident Fund (40091/2012) [2014] ZAGPPHC 149 (25 March 2014) [2014] ZAGPPHC 149

COURT

North Gauteng High Court, Pretoria

BEFORE

Avvakoumides

CASE / FILE NUMBER

40091/2012

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 40091/2012

DATE OF HEARING: 12 AND 13 MARCH 2014

DATE: 25 MARCH 2014

REPORTABLE

OF INTEREST TO OTHER JUDGES

In the matter between:

LEANDI LIGTHELM..... PLAINTIFF

and

ROAD ACCIDENT FUND.....DEFENDANT

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION

1. The plaintiff was conveyed as a passenger in a motor vehicle on 27 November 2009 when the vehicle was involved in a head on collision on the road between Ladysmith and Winterton, KwaZulu Natal. She sustained serious injuries which are dealt with in detail hereunder.

Prior to the trial the issue of liability was settled wholly in favour of the plaintiff and the trial proceeded thus only on the

question of quantum. On the first day of trial I was advised by the defendant's counsel, Ms Olivier, that the travelling costs claimed by the plaintiff in the sum of R10 356.40 were conceded.

2. It is necessary to mention that inasmuch as the plaintiff had filed several medico-legal reports pertaining to her injuries the defendant only filed reports of an Occupational Therapist and that of an Industrial Psychologist. The defendant attempted to file an actuarial report and calculation late but this was objected to by the plaintiff's counsel, Mr De Waal SC and not taken any further by the defendant.
3. It is puzzling how the defendant was able to instruct its Occupational Therapist and Industrial Psychologist and obtain reports from them without procuring any other medical reports, regard being had to the serious injuries sustained by the plaintiff. No meaningful reason was evident.
4. Moreover, I noted from the pre-trial minute in respect of the conference held on 3 March 2014 that the plaintiff's medico-legal reports were admitted only because of the failure of the defendant to revert to the questions set out therein by 6 March 2014. The only inference is that the defendant must have based its own Occupational Therapist and Industrial Psychologist reports on the plaintiff's doctors' reports. I was also informed by defendant's counsel on the first day of trial that the defendant had also accepted an amount of approximately R899 000.00 in respect of the plaintiff's past medical expenses but that she was waiting for further instructions during the day in this regard.
5. Although I have sympathy with defendant's counsel in her efforts to present the case for the defendant, and bearing in mind the defendant's approach to this case, and generally to third party claims, it was very clear to me that counsel had been instructed very late and that very little preparation could have been done. On the other hand the plaintiff's legal team were well prepared and appeared to have done their best to try and settle the case prior to trial. I say so with reference to the questions and issues raised and discussed with the defendant's legal representative at both the pre-trial conferences and the exchange of documents and correspondence which appears from the various bundles before me.
6. As early as November 2012 and before the merits were conceded, the defendant was aware that the plaintiff and her legal team would

travel to Bahrain for an inspection of the plaintiff's work environment and the employment market there in respect of the

plaintiff's occupation.

7. The issues that were not in dispute are that the plaintiff is entitled to be furnished with an undertaking in terms of section 17(4)

- (a) of the Road Accident Fund Act, 56 of 1996 (“the Act”) and that the plaintiff is entitled to general damages in the amount of R1 100 000.00 in terms of a settlement concluded between the parties during the afternoon of the first day of trial and the travelling expenses referred to above in the sum of R10 356.40.
8. The issues in dispute were the plaintiff’s past loss of income claimed by her in the amount of R147 456.00, the future loss of income claimed by her in the amount of R6 756 536.00 and the past hospital, medical and related expenses claimed in the amount of R2 802 066.86.

THE PLAINTIFF’S INJURIES

9. The nature and extent of the plaintiff’s injuries were common cause and based on the defendant’s admission of the relevant

medico-legal reports, and consisted of the following:

- 9.1 A closed fracture of the right humerus;
- 9.2 An open fracture of the left ilium;
- 9.3 A fracture of the right anterior iliac spine at the level of L5;
- 9.4 A radial nerve palsy on the right;
- 9.5 A lineal fracture of the right occipital bone;
- 9.6 A minor concussive brain injury;
- 9.7 Perforation of the small bowel (specifically the caecum);
- 9.8 A laceration of the spleen with extensive intra-abdominal haemorrhage;
- 9.9 Blunt chest trauma with right sided plural effusion and atelectasis;
- 9.10 Facial abrasions and a peri-orbital haematoma;
- 9.11 Severe psychological shock and trauma likely to endure for the plaintiff’s lifetime.
10. It was also common cause that the plaintiff underwent various surgical procedures and an extended stay in hospital of approximately 3 months of which the most recent was a spinal fusion performed during June to July 2013.
11. It was submitted by plaintiff’s counsel that insofar as the remaining issues are concerned, the treatment which the plaintiff

will or may undergo in future is relevant to such remaining issues, in particular the aspect of a future loss of earnings or earning

capacity.

12. It was common cause that the following aspects of future treatment would have to be considered in the context of the plaintiff's claim for future loss of earnings or earning capacity:
 - 12.1 Removal of the fixation of the right humerus;
 - 12.2 Possible surgery to the left sacro-iliac area;
 - 12.3 Possible neck surgery;
 - 12.4 Possible exploration of the right iliac crest area;
 - 12.5 At least two episodes of incomplete bowel obstruction requiring hospitalisation;
 - 12.6 Two episodes of bowel obstruction requiring surgery;
 - 12.7 One episode of intra-abdominal abscess;
 - 12.8 Repair of abdominal wall defect due to a ventral hernia;
 - 12.9 Likely caesarean section procedures if the plaintiff falls pregnant, which are likely to be highly risky and complicated due to extensive abdominal adhesions which can be expected;
 - 12.10 Revision of some scars with a high possibility of complications.
13. It was common cause that the plaintiff suffers and will continue to suffer from pain and discomfort, and also complications secondary to her abdominal injury (unpredictable and potentially embarrassing bouts of diarrhoea, nausea and vomiting) all of which is likely to cause early retirement at the approximate of 55.5 years.
14. The plaintiff's Industrial Psychologist Mr Wessels, whose evidence was largely uncontested, was that it should be borne in mind that in the period leading up to early retirement, the deteriorating condition of the plaintiff is likely to have a significant impact on her employability and her competitiveness in the international open labour market.
15. The future treatment envisaged and the inevitable impact on the plaintiff's career must be coupled thereto. This does not take into account any unforeseen or underestimated modalities of treatment.
16. Dr Birrell for instance estimated the chance of the plaintiff requiring lumbar surgery at 20% during July 2011 when he prepared his first report. Within 2 years of this report, it was necessary for the plaintiff to undergo a spinal fusion.

PAST HOSPITAL, MEDICAL AND RELATED EXPENSES

17. The minutes of the pre-trial conference of 3 March 2014 reflect the defendant's undertaking to revert to the plaintiff with a comprehensive schedule indicating which accounts or portions thereof are not admitted and the reasons therefore by close of business on Monday 10 March 2014. It is no surprise that this did not happen.

18. The absence of the defendant's response to the past hospital and medical expenses meant that the plaintiff had to lead evidence on these costs. The defendant did not have any evidence to contradict such evidence. On the second day of trial the defendant conceded the past hospital and medical expenses in the sum of R2 802 066.86.

PAST AND FUTURE LOSS OF EARNINGS

19. The relevant evidence for determination of this part of the plaintiff's claim is the medico-legal reports that were admitted, more particularly the reports of Drs Birrell, White, Barnettson, du Plessis, Mazabow and Trouw and the report of Ms K Havenga, a counselling psychologist.
20. In addition the report and viva voce evidence of Ms T Brown, the Occupational Therapist, the report and viva voce evidence of Mr G Whittaker, the Actuary, the report and viva voce evidence of Mr Wessels, the Industrial Psychologist together with the admitted affidavit of Mr B Johnson, the headmaster of the school at which the plaintiff is currently employed in Bahrain were of invaluable assistance.
21. According to the report of the defendant's Industrial Psychologist, Mr P C Diedericks, who was neither called nor relied upon by the defendant, the plaintiff would have obtained her B Com degree in 2010 and would have entered the labour market at the end of 2010, but for the accident.
22. This in my view, and correctly submitted by Plaintiff's counsel, would be the reason for the defendant not challenging the plaintiff's version that she would have been able to enter the labour market and her current employment in at least January 2012, a year later than envisaged by the defendant's own industrial psychologist. It is notable however that Mr Diedericks considered the plaintiff's future employment within the South African content, incorrectly so, and arrived at the conclusion that the plaintiff would probably have been employed until the age of 65 years.
23. The calculations by the actuary Mr Whittaker were not challenged and according to his calculation, based on the plaintiff's current level of employment, the loss sustained in respect of past loss of earnings is R147 456.00 if the loss limit or "cap" commonly referred to, in terms of the Act, is applied. In the absence of any contradictory evidence from the defendant and on the evidence presented I am of the view that the amount of R147 456.00 is the correct amount in respect of past loss of earnings.
24. In respect of the plaintiff's future loss of earnings the defendant challenged this claim on the basis of the plaintiff's

retirement age but for the accident and the appropriate contingencies to be applied to the future loss, particularly the contingencies to be applied to the calculated loss, having regard to the accident.

25. The defendant had conceded that the plaintiff's future employability has to be assessed on the basis of her employment in

the international sphere. The facts before me show that the plaintiff underwent all her secondary schooling in the Middle East and only returned to South Africa to study towards her B Com degree. Her parents moved to the United Arab Emirates ("UAE") in

1999. They have been there ever since. The plaintiff's intention has always been to seek employment in the UAE.
26. On the issue of the retirement age it would appear that the retirement age where the plaintiff is currently employed is 60 years. However Mr Whittaker testified that international trends show that the retirement age, especially in the western world, is on an upward trend mainly as a result of longer life expectancies and issues of affordability as far as pension funds are concerned.
27. The evidence of Mr Johnson appearing on his affidavit, and admitted by the defendant, is that the retirement age of 60 years only applies in Bahrain and despite that "semi-ceiling", an employee may work beyond that age. The plaintiff's current employer operates schools worldwide. The plaintiff would have been able to seek employment at any of the schools in any country according to Mr Wessels. She would also not have been limited to employment with her current employer. On a balance of probabilities and on the evidence presented I am of the view that the plaintiff would probably have been employed until the age of 67 years.
28. On the question of contingencies I was referred to what was stated in the case of Southern Insurance Association Limited v Baily NO 1984
- (1) SA 98 (A) at 113G – 114C:
- "An inquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without benefit of crystal balls, soothsayers, augurs, or oracles. All that the court can do is to make an estimate, which is often a rough estimate, of the present value of the loss... (and with reference to Anthony and Another v Cape Town Municipality 1967 (4) SA 445 A at 541B – C) when it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss..."*
29. It is trite that every case has to be assessed on its own facts and no two cases are exactly the same. Plaintiff's counsel submitted that a high post-accident contingency ought to be applied to this case and referred me to the case of Hall v Road Accident Fund 2013 (6J2) QOD 126 (GSJ) at paragraphs 52 to 54 where the court applied a fairly high post-accident contingency in the context of already having allowed early retirement of 12½ years. A 50% contingency deduction was applied to the future loss.

30. Plaintiff's counsel also referred me to the case of in Swartz v Road Accident Fund 2011 (6J2) QOD 74(ECP) paragraph 38 in which Eksteen J stated the following:

"The stronger the evidential basis for the assumption the greater the validity of the calculation would be. The weaker the evidential basis for these assumptions become the greater the doubt becomes as to the authority of the calculation. This, it seems to me, is a factor which would have considerable bearing on the adjustment which needs to be made to such a calculation to allow for the possibility of error in the assumptions made. This may sometimes be difficult, however, as Margo J remarked in Goodall v President

Insurance Company 1978 (1) SA 389 (W) at 392H-393A: 'In the assessment of a proper allowance for contingencies, arbitrary consideration must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office.'

31. It was clear from the evidence of Mr Wessels read with the affidavit of Mr Johnson that the plaintiff is employed on a contract basis renewable every year depending on performance. She is currently only 26 years old and has a very long working life ahead of her. There is a real risk of her contract not being renewed over a long period. She will be competing with able bodied individuals. She requires multiple surgical procedures and other forms of medical treatment in future.
32. The surgical procedures will inevitably necessitate periods off from work from time to time. If the risk of complications is added to the equation, these periods may be extended. This in itself may jeopardise renewal of contracts in her present employment situation
- and her overall medical condition, and the envisaged treatment will of necessity render her less attractive to any other employer able to pick and choose from able bodied individuals.
33. Mr Wessels was of the view that other employment opportunities have been definitely closed to the plaintiff. On the facts and evidence before me I am inclined to agree. It must follow that some of the other opportunities may include opportunities to earn more than what the plaintiff is currently earning or is likely to earn in future in her current employment.
34. Plaintiff's counsel submitted that the plaintiff's loss may actually be even greater if the loss limit was not applicable. He submitted that even with the application of the loss limit, the loss may have been greater simply because the limit may have applied in periods where the plaintiff now falls below the limit.

35. Given the circumstances and taking into account the opinion of Mr Wessels that a significantly higher contingency deducted, expressed by him at a figure in excess of 30%, appears to be justifiable and reasonable. Based on the calculation of Mr Whittaker at scenario 2 of his report the contingencies applied to the calculation of the future loss of 15% (the uninjured scenario) and 55% (the injured scenario) resulting in a differential of 40%, is conservative under the prevailing circumstances.
36. This effectively means that, compared to an able bodied and uninjured individual in the same position, it is assumed that the plaintiff has a 60% chance of sustaining and maintaining her present employment until retirement at 55.5 years as envisaged by Dr Birrell. Having regard to the calculation of Mr Whittaker after application of the loss limit in terms of the Act the plaintiff's future loss of earnings is calculated at R6 756 536.00.

COSTS

37. The plaintiff's counsel submitted that the defendant ought to be censured with a punitive order for costs in respect of the second day of trial which, according to him, was unnecessary. He submitted that the defendant should have conceded the past hospital and medical expenses well before the trial because the supporting documents had been furnished to the defendant well in advance. The defendant made no effort to verify these expenses and led no contradictory evidence to this aspect of the claim.
38. Furthermore plaintiff's counsel submitted that in respect of the experts that testified on behalf of the plaintiff, I should consider ordering that their costs should be paid by the defendant on the scale as between attorney and own client. I have difficulty in understanding this concept in the context of expert witnesses. I deal with this aspect hereunder.
39. Defendant's counsel's submissions in this regard were simply that the defendant was entitled to challenge the evidence and that doing so should not attract any censure. She submitted that this case involved public funds and as such the court should adopt a protective approach to such funds instead.
40. As I stated above it was clear that no instructions were forthcoming from the defendant. Because of the defendant's lackadaisical

attitude to third party litigation it is those funds that are ostensibly being protected that are actually being wasted. However

that is not the issue. In my view the courts ought to adopt a stricter approach to the obstructive and ineffective role played by the defendant in third party cases in allowing cases to go on trial when such cases can and should be settled.

41. As at 3 March 2014 this case could and should have been settled. The plaintiff had supplied the defendant with everything it required to consider the claim as a whole. Instead no decisions were made until the last minute, when counsels' first day trial fees had already

been incurred, and then on the pretext that it is dealing with public funds, the defendant tries to justify its actions or inactions on the basis that public funds should be protected. This however has an impact on plaintiffs in third party cases who have to pay additional amounts, more often than not large amounts, being those not recoverable on the scale as between party and party.

42. Consequently, I am of the view that the second day of trial was indeed unnecessary and as a result the costs of the second day of trial ought to be paid by the defendant on the scale as between attorney and own client. The same applies to the first day of trial.
43. Insofar as the costs of the experts who testified for the plaintiff are concerned the defendant's counsel submitted that she was entitled to cross examine them and to challenge their evidence as that this is the defendant's right. Whilst this may generally be true the cross examination and challenge to the expert evidence revealed that no meaningful challenge was made. The defendant did not rely upon its own expert witnesses.
44. The preparation of the three experts of the plaintiff that testified was necessary for the trial. Because of the defendant's approach to their reports and opinions expressed therein it was necessary for these experts to attend the trial and testify. In the case of all three they spent the bulk of the first day in court. Mr Wessels in particular spent the whole day in court. They contributed largely to the resolution of this case. I am thus of the view that they were necessary for purpose of the trial.
45. However in the light of the decision of *Transnet Ltd t/a Metrorail and Another v Witter* [2008] ZASCA 95; 2008 (6) SA 549 (SCA) it is no longer necessary for a court to declare a witness necessary. In terms of this decision the qualifying fees of experts, commonly referred to as preparation fees, will only be allowed on taxation if such costs are authorised by the court or with the consent of all the parties. The proviso to item 5 of part D of Uniform rule 70 makes this clear, as follows: "Provided that the preparation fees of a witness shall not be allowed without an order of the court or the consent of all interested parties."
46. This proviso sets out the general duties of the taxing master as follows: " With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the Taxing Master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges and expenses to witnesses or to other persons or by other unusual expenses."

47. The allowances paid to witnesses and which are prescribed pursuant to section 42 of the Supreme Court Act No. 59 of 1959 may be claimed on taxation in respect of any witness, lay or expert. The current tariff, published in 2008 provides for a subsistence allowance, transport and travelling expenses, and an allowance up to a maximum of R1500.00 for lost income in consequence of attendance at a civil case, and it no longer distinguishes between expert and other witnesses.
48. No special charges or expenses paid to a witness can be taxed because of the latter part of Uniform rule 70 (3) quoted above. An agreement by a party to remunerate a witness for testifying in his cause (as opposed to an undertaking to pay a witness the statutory allowances) is against public morals and is unenforceable. See *Van Aswegen v Lombard* 1965 (3) SA 613 (A) and the cases quoted therein. This also applies to expert witnesses, although an expert can charge for preparation. See *Marais v Pilkington* 1905 TS 650 at 651-652 approved in the case of *Van Aswegen*, supra.
49. According to the case of *Transnet* supra, though an expert differs from an ordinary witness in this respect, that he is a volunteer and must qualify himself by ascertaining the facts upon which he then proceeds to bring his opinion to bear, yet when he has done so there is no real distinction between his position and that of a man who happens to have seen certain things take place and has to depose regarding the particulars of what he saw. A man who has gone out of this way to qualify himself, who has put himself in possession of the facts, and has formed his opinion as an expert is as much bound to impart his opinion to the court as an ordinary man is to state what he knows about facts in dispute.
50. Although an expert is free to stipulate for whatever rate he considers appropriate for preparation, those fees cannot include remuneration for time spent in the witness box. See *Pakes v Moseley* 1909 TS 166 also approved in the case of *Van Aswegen*, supra.
51. Thus if the court allows the preparation fees of an expert, it does not follow that the allowances prescribed under the Supreme Court Act should also be claimable on taxation. By way of an example, if the issue on which the expert was to testify falls away after the preparation fees were incurred and his attendance at court became unnecessary, any allowances subsequently paid for this purpose might not be claimable on taxation. This would depend on whether such allowances were reasonably necessary. This question is to be answered not with the benefit of hindsight but when the fees or expenses were incurred. See *Stauffer Chemical Co and Another v Safsan Marketing and Distribution Co (Pty) Ltd and Others* 1987 (2) SA 331 (A) at 354I-355H.
52. In my view the preparation fees and time spent in court in respect of the plaintiff's three experts were reasonable and must

therefore be allowed. I direct the taxing master approach these costs on the understanding that the court's intention is to grant the plaintiff's as much of these costs as possible. Consequently the taxing master should apply his/her discretion as wide as possible to achieve this result.

CONCLUSION

53. Consequently I make an order in terms of the draft order annexed hereto as "A", save and except that the expert witnesses referred to in paragraph 3.8.1 thereof shall be determined by the taxing master, as directed above and that paragraph 3.7 thereof is deleted.

AVVAKOUMIDES, AJ

JUDGE OF THE HIGH COURT

Representation for the Plaintiff:

Counsel: Adv: W P De Waal SC

Instructed by Adams & Adams

Representation for Defendant:

Counsel: Adv: M Olivier

Instructed by: Maluleke Seriti Makume Matlala

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